

Staff summary of discussions on framework agreement between EPA and DEQ regarding implementation of the Portland Harbor Superfund Cleanup ROD

This memo summarizes the key assumptions and perspectives on major issues that need to be addressed in building a framework agreement between EPA and Oregon on assuring sufficient certainty of implementation of the ROD for the Portland Harbor Superfund Cleanup.

Key Assumptions:

All work done to implement the ROD would be conducted under CERCLA legal authority. As such, all final cleanup decisions will have to be approved by EPA, and any disputes/differences between EPA and DEQ would have EPA as the final decision-maker.

1. Since DOJ is the only federal agency who can grant releases of liability under federal law, DOJ's buy-in to the framework being developed for this Site is required.
2. As the site is divided into sub-site work areas, any release of liability to performing parties at a sub-site work area would be limited to the liability for that sub-site work area.
3. Any sub-site work area for which DEQ would provide the technical governmental oversight would require EPA approval regarding successful implementation of that aspect of the ROD for the sub-site area in question.
4. The goal thru sharing technical governmental oversight of sub-site work area implementation between EPA and DEQ is that EPA and DEQ would perform oversight in substantially similar manner and outcomes and in accordance with the ROD, the NCP, and EPA guidance.
5. EPA and DEQ share the objective that dividing up the site and sharing technical governmental oversight responsibilities not adversely affect the allocation process of liability that the PRPs are conducting.
6. How the precise way that the site might be subdivided into sub-site work areas, what scenario of organizing work in those work areas is desirable, and what sub-site work areas might be best for DEQ to conduct technical governmental oversight is dependent upon which PRPs actually express a willingness to moved forward with implementation at the pace that EPA and DEQ want it to proceed. Knowing which PRPs are willing to do what to support timely implementation of the ROD will become explicitly more clear after the ROD is issued.
7. Tribal partners will retain their connection with EPA thru EPA's trust responsibilities and government-to-government consultations in sub-site work areas that DEQ is providing the technical governmental oversight of implementation. At those areas, DEQ will work with EPA to help EPA effectuate EPA's trust responsibilities.
8. For EPA and DEQ to successfully conduct technical governmental oversight of ROD implementation for selected sub-site work areas, a shared understanding of DEQ's role and EPA's authorization of DEQ's work in those sub-site work areas will be needed. This will also

entail building and sustaining a strong inter-agency team connectivity and support to ensure consistency by both agencies, to foster creative, efficient, effective problem-solving and to present a unified approach to the PRPs, tribal partners and the community at large.

Key Issues:

There are several key issues that need to be addressed when establishing the framework for EPA/DEQ coordination, collaboration and work sharing to assure sufficient certainty of implementation of the Portland Harbor ROD. The staff team has discussed each of these and will be prepared to initiate discussion of them at the August 22 meeting. These include:

1. How can/will the site be split up into smaller sub-site work areas (aka 'hotspots') in order to encourage relevant responsible parties to move forward in those work areas they are primarily or totally responsible for? There are criteria that can be used to divide up the site, including the number of PRPs involved at a particular hotspot, the complexity of the necessary cleanup, the location of the hotspot and any potential recontamination risks it might create, the likelihood of responsible parties to come forward early, etc. Hence, splitting the site up involves both technical and phasing aspects.
2. What incentives could be developed or made apparent to PRPs to encourage early implementation? The primary incentive is the government's ability to provide liability release to responsible parties for successful technical implementation of work done on a specific work area or hotspot. Full release for all liability must await completion of the whole ROD. Another motivator for early implementation is the ability to avoid having more rigid enforcement actions by EPA imposed upon various responsible parties.
3. What does enabling DEQ to conduct the technical governmental oversight at selected work areas/hotspots mean in terms of performance measures, legal authority and necessary EPA oversight of DEQ's decisions? For work areas/hotspots in which DEQ may provide the technical governmental oversight, the cleanup would continue to be conducted under the legal authority of Superfund. DEQ would thus be focused on the technical aspects of the cleanup. The performance measures would be those necessary to ensure that the ROD is implemented appropriately and in accordance with CERCLA, the NCP and EPA guidance. To establish that baseline, in light of the ability to split up the site, it might make sense for EPA to begin implementation actions on the most complex (and contentious?) work areas/hotspots first as well as ones that would involve many of the technical decision trees that other work areas/hotspots would be utilizing (such as dredging, capping, enhanced natural recovery, etc.) DEQ could then conduct the technical governmental oversight on less complex/contentious work areas and/or begin on work areas after EPA has established the path forward on handling critical technical issues that subsequent work areas will encounter. As DEQ provides technical governmental oversight on work areas/hotspots, there will be a series of interim and final decisions that EPA would have to approve prior to the United States (DOJ) ultimately granting release from liability for a completed hotspot cleanup. (Current source control relationships between EPA and DEQ may provide a template here, however there will not be federal releases of liability for the uplands work.) As well, establishing a strong interagency team approach will be needed to ensure consistency across work areas, joint learning on technical problem-solving, mutual understanding of data, technical and legal issues shared across work areas/hotspots, etc. In order for such close cooperation and coordination to occur, EPA and DEQ will need to do

some significant resource planning and skill allocation over an extensive period of time to ensure that implementation will occur as anticipated.

4. What is the government's preferred way of managing the 'rest of the site' cleanup (i.e., the 85% of the river not in the identified work areas/hotspots), including site-wide responsibilities for data management, five-year reviews, etc.? The concept of a Trust is being explored by both EPA and DEQ. Who can authorize a Trust, who manages it, how it is funded by whom all need further research. As well, how to engage the PRP's, whose agreement on the concept of a Trust is critical for moving forward on establishing one, has yet to be determined.
5. How might a broader program of habitat protection, water quality improvement and toxic control that extends up the watershed and into the Columbia River assist in implementing the ROD? The 11 mile stretch of the Willamette River covered by the Portland Harbor Superfund site is only one component of a complex watershed system that includes inputs into the Columbia River. What would such a broader effort entail, how much of it is currently operational and what additional elements might it make sense to launch concurrent with implementation of the ROD still need to be determined.
6. What are some of the factors that could affect how quickly implementation of the ROD could begin and which the governmental agencies have limited ability to affect? Significant responsibility for timely implementation of the ROD rests initially with the responsible parties. How quickly they embrace their responsibility to act under the ROD, and not wait for EPA enforcement or unilateral action will be crucial in getting the RD/RA going quickly. Some of these factors include: Having sufficiently clear allocation of costs completed by the PRP's, conducting additional sampling (by whom, for what purpose, and with what governmental oversight) during RD at some of the work areas hotspots and/or all across the site, how quickly PRPs at those work areas/hotspots that would best be phased for early implementation can and do organize to begin RD, etc.
7. Others (such as tribes, natural resource trustees and citizen groups) that need to be considered when developing the framework for assuring sufficient certainty of implementation of the ROD for the Portland Harbor Cleanup? How do we document and their involvement/participation in the development of the framework?